AMERASEKERA
v.
AMARASINGHE

COURT OF APPEAL
WIGNESWARAN, J.,
WEERASURIYA, J.
C.A. NO. 593/96
D.C. COLOMBO NO. 35246/NS
NOVEMBER 4TH, 1997
DECEMBER 01ST, 1997

Civil Procedure Code – Cap LIII – S. 704(1)(2) – Unconditional leave to appeal and Defend – Promissory Note – Was it duly Stamped – Stamp Duty Act No. 43 of 1982 – S. 7, S. 7 (2), S. 7 (3) – Bills of Exchange Ordinance – S. 30 (1)–genuiness of the defence.

The plaintiff-petitioner instituted action under Caption LIII of the Civil Procedure Code to recover a sum of Rs. 3 million on a promissory note.

The defendant-respondent was granted unconditional leave to appear and defend. In the revision application it was contended that court failed to –

(a) Consider whether the defence is *prima facie* sustainable.
(b) Consider whether the defence was *bona fide.*
(c) Adduce reasons.

Held:

1. It was manifest on an examination of S. 704 (2) that it requires the court to consider the petition and affidavit together with any document annexed and decide whether the defendant has disclosed a *prima facie* sustainable defence. It further requires the court to consider that even if the defendant disclosed a *prima facie* sustainable defence whether such defence is *bonafide.*

2. The averment in the affidavit of the defendant-respondent that the promissory note in question was a false and fraudulent document does not only by itself furnish any material in the absence of other circumstances to buttress that allegation.

3. The defendant – respondent had averred that no consideration passed, having regard to the absence of a specific averment denying the signature on the promissory note this denial of consideration has no meaningful effect.

Per Weerasuriya, J.

"By making a general statement of fraud without specifying particulars or grounds of such fraud one cannot discharge the burden of satisfying court of a *prima facie* sustainable defence and presence of good faith".

4. The promissory note should be stamped with stamps to the value of Rs. 1,500. However, any instrument bearing an adhesivee stamp which has not been cancelled in the manner set out in S. 7 (1) (2) is deemed to be unstamped to the extent of the value of that stamp.

APPLICATION in Revision from the order of the District Court of Colombo.

Cases referred to:

1. *C. W. Mackie and Co., Ltd. v. Trans Lanka Investment Ltd.* 1995 – 2 SLR 6.
2. *Anamalay v. Allien* – 2 NLR 25.
3. *Ramasamy Chetty v. Uduma Lebbe Marikar* 5 NLR 310.
4. *Rengaswamy v. Pakeer* – 14 NLR 190.
5. *Supramanian Chetty v. Krishnasamy Chetty* 10 NLR 327.
6. *De Silva v. De Silva* 49 NLR 219 at 223.
7. *Wallingford v. The Directors of the Mutual Society* (1880) 5 AC 685.

Romesh de Silva PC with *Palitha Kumarasinghe* for plaintiff-petitioner.

N. S. A. Goonatilleke PC with *M. B. Peramuna* for defendant-respondent.

Cur. adv. vult.

March 19, 1998.

WEERASURIYA, J.

The plaintiff-petitioner by plaint and supported by an affidavit dated 18.03.1996 instituted action against the defendant-respondent in terms of chapter LIII of the Civil Procedure Code to recover a sum of Rs. 3 million on a promissory note marked 'X' together with interest thereon. The defendant-respondent by petition and affidavit dated 08.05.1996 sought leave to appear and defend the action unconditionally. The Additional District Judge by his order dated 21.08.1996 granted defendant-respondent unconditional leave to appear and defend. It is from the aforesaid order that the present application for revision has been filed.

The case of the plaintiff-petitioner in this revision application has been presented on the following grounds namely :

(*a*) that the learned District Judge had failed to consider whether the defence is *prima facie* sustainable;

(*b*) that the learned District Judge had failed to consider whether the defence is *bona fide;* and

(*c*) that the learned District Judge had failed to adduce reasons for his order.

The defendant-respondent had sought unconditional leave to appear and defend the action basically on the ground that she had denied the execution of the said promissory note. However, learned counsel for defendant-respondent submitted that subsequent to the filing of petition and affidavit, he sought to challenge the promissory note on the basis that it was not duly stamped in terms of the provisions of Stamp Duty Act, No. 43 of 1982 and that court is precluded from accepting such document. It must be observed that a copy of the promissory note and the letter of demand had not been served on the defendant-respondent along with the summons and on being requested by her, the plaintiff-petitioner had forwarded copies of such documents as evidenced by letter dated 17.05.1996 (P5b). It transpired that the defendant-respondent had sought to tender written submissions on the question of proper stamping of the promissory note which however was refused by the District Judge on being objected to by the plaintiff-petitioner.

Section 7 of the Stamp Duty Act requires that the person executing an instrument which is chargeable with stamp duty shall cancel the stamps by writing his name across it. Section 7 (2) lays down that where an instrument bears an adhesive stamp of the value of Rs. 50 or more such stamp should also be cancelled by cutting it with a prick, punch, cutter or nipper. In terms of item No. 19 of the regulations published in the *Gazette Extraordinary* No. 224/3 of 20.12.1982 made by the Hon. Minister of Finance and Planning by virtue of powers vested in him by section 1 of the Stamp Duty Act,

the promissory note filed in this action should be stamped with stamps to the value of Rs. 1,500. Section 7 (3) of the Stamp Duty Act stipulates that where any instrument bearing an adhesive stamp which has not been cancelled in the manner set out in subsections (1) and (2) shall be deemed to unstamped to the extent of the value of that stamp.

Learned counsel for the defendant-respondent contended that the promissory note marked 'X', bears only one stamp to the value of Rs. 10 which had been cancelled. However, it would appear that the defendant-respondent had not disputed the fact that the promissory note had been stamped with stamps to the value of Rs. 1,500. Thus, it is to be noted that what is in issue is not sufficiency of the value of stamps affixed to the promissory note, but the question of non-cancellation of some stamps. It is to be observed that section 33 (1) of the Stamp Duty Act prohibits any instrument chargeable with stamp duty not duly stamped from being received or admitted in evidence. However, it is significant to note that what section 7 (3) stipulates is that any instrument bearing a stamp which has not been cancelled in the manner set out in subsections (1) and (2), shall be deemed to be unstamped only to the extent of the value of that stamp. In the circumstances, the contention of learned counsel for the defendant-respondent that the contents of the promissory note should be rejected *in toto* is untenable.

Section 704 (1) of the Civil Procedure Code provides that –

" . . . the defendant shall not appear or defend the action unless he obtains leave from the court . . .

Section 704 (2) provides that –

"The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into court the sum mentioned in the summons or to give security therefor, unless the court thinks his defence not to be prima facie sustainable or feels reasonable doubt as to its good faith".

It is manifest on an examination of section 704 (2) that, it requires the court to consider the petition and affidavit together with any document annexed and decide whether the defendant has disclosed a *prima facie* sustainable defence. However, this section further requires the court to consider that even if the defendant discloses a *prima facie* sustainable defence, whether such defence is *bona fide.* In other words, if court is doubtful of its genuineness, the defendant may be required to furnish security before being permitted to appear and defend. Vide *C. W. Mackie & Co., Ltd. v. Trans Lanka Investments Ltd.*[1].

In the case of *Anamalay v. Allien*[2] it was held that in an action under chapter LIII of the Civil Procedure Code, the court cannot order the defendant to bring the money into court as a condition of being allowed to defend unless the defence set up is bad in law or the court has reasonable doubt as to its good faith.

In the case of *Ramaswamy Chetty v. Uduma Lebbe Marikar*[3] it was held that where the defence set up by the defendant to an action on a promissory note appears on the face of his affidavit to be good in law and no reasonable doubt exists as to the *bona fides* of the defence, it is the duty of the District Court to permit him to appear and defend without security.

In the case of *Rengasamy v. Pakeeer*[4] it was held that where the defendant in an action by summary procedure on a liquid claim, has sworn to things which, if proved, will be a good defence, he should be allowed to defend unconditionally, unless there is something on the face of the proceedings which leads the court to doubt the *bona fides* of the defence.

Upon an examination of these authorities, it would be clear that even if the defendant has made out a good defence unless the defendant has not made out a *bona fide* defence, court would not permit unconditional leave to appear and defend the action.

Thus, it would be seen that even if the defence is *prima facie* sustainable, court has to examine the further issue whether reasonable grounds exist to doubt good faith in such a defence. In the case of *Supramanian Chetty v. Krishnasamy Chetty*[5] it was observed that the Court should consider whether the defendant's

affidavit is satisfactory. It is noteworthy that, in that case the question was whether the defendant had paid Rs. 1,300 out of Rs. 2,000 owing on a formal acknowledgment and he swore that he had paid. However, his affidavit was not supported by receipts and accounts. In the case of *De Silva v. De Silva*[6] at 223 Howard, CJ, quoted with approval the observations of Lord Blackburn in the case of *Wallingford v. The Directors of the Mutual Society*[7]:

> *"Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment. . . He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend. . . I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear 'I say I owed the man nothing'. Doubtless, if it was true that you owed the man nothing as you swear that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence" . . .*

The defendant-respondent in her affidavit seeking leave to appear and defend had averred that promissory note in question was a false and fraudulent document made up for the purpose of this action and that in any event no consideration whatsoever passed between her and the plaintiff-respondent.

It is highly relevant to observe that the defendant-respondent in her affidavit had not specifically denied the execution of the promissory note. What she had averred in paragraph 4 of her affidavit was that, she denied the averments in paragraphs 2, 3, 5, 6, 7 & 8 of the plaint and the corresponding paragraphs of the affidavit. It would be thus clear that apart from a general statement denying the

several averments in the plaint, there was no specific averment to deny the execution of the promissory note. Further, while asserting that the promissory note was a false and a fraudulent document, there was no specific averment that her signature does not appear on the instrument. The absence of a specific averment denying her signature on the promissory note assumes great significance in view of the provisions of section 30 (1) of the Bills of Exchange Ordinance which provides that –

> *"Every party whose signature appears on a Bill is prima facie deemed to have become a party thereto for value".*

Section 30 (1) of the Bills of Exchange Act of 1882 of the United Kingdom is identical to section 30 (1) of our Act, Byles on Bills of Exchange (26th edition chapter 19 page 243) while commenting on presumptions as to consideration states as follows :

> *"If a man seeks to enforce simple contract he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule, bills and notes are an exception. . . In the case of other simple contracts, the law presumes that there was no consideration till a consideration appears; in the case of contracts on bills or notes, a consideration is presumed till the contrary appears or at least appears probable. . . .*

The defendant-respondent in paragraph 7 of the affidavit had averred that no consideration whatsoever passed between her and the plaintiff-petitioner in any such transaction as pleaded in the plaint. Having regard to the absence of a specific averment denying the signature on the promissory note, this denial of consideration has no meaningful effect. This assertion by the defendant-respondent does not have the effect of rebutting the presumption as spelt out in section 30 (1) of the Bills of Exchange Ordinance.

The averment in the affidavit of the defendant-respondent that the promissory note in question was a false and a fraudulent document does not by itself furnish any material, in the absence of other

circumstances to buttress that allegation. By making a gneral statement of fraud without specifying particulars or grounds of such fraud, one cannot discharge the burden of satisfying court of a *prima facie* sustainable defence and presence of good faith. In the case of De *Silva v. De Silva* (*supra*) it was held that in an action where the defendant's affidavit indicates that his defence is not *prima facie* sustainable, he should be required to give security as a condition of his being allowed to appear and defend.

It was observed in the case of *C. W. Mackie & Co., Ltd. v. Trans Lanka Investments Ltd.* (*supra*) that at the stage of considering the application of the defendant-respondent for leave to appear and defend, court is not called upon to inquire into the merits of the cases of either party.

A careful examination of the defendant-respondent's affidavit reveals that reasonable doubts arise about the genuineness of the defence disclosed with regard to the plaintiff's action. She had made a general statement of fraud but she had not 'condescended' upon any particulars of such fraud.

For these reasons, I set aside the order of the learned Additional District Judge of Colombo dated 21. 08. 1996. The defendant-respondent is directed to deposit the full sum claimed in the plaint by the plaintiff-petitioner before she is permitted to appear and defend the action.

WIGNESWARAN, J. – I agree.

Appeal allowed.